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Supreme Court, U.S.
FILED

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No. (1)

In The

Supreme Court of the United States

RAFAL PIETRZAK,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE:

After Petitioner was convicted by a Texas jury, his counsel rendered ineffective assistance of counsel by failing to timely file a Notice of Appeal. The Court of Criminal Appeals of Texas granted post conviction *habeas corpus* relief and restored him to a procedural position that allowed him to seek review of his conviction via direct appeal, thereby rendering his previously final conviction, nonfinal for Texas law purposes. When Petitioner ultimately sought relief from his conviction pursuant to 28 U.S.C. § 2254, the district court, based on the reasoning of the Fifth Circuit in *Salinas v. Dretke*, held that the statute of limitations under 28 U.S.C. § 2254(d)(1) began running when Petitioner's counsel failed to timely file the Notice of Appeal rather than after Petitioner's conviction was rendered final for Texas law purposes (after it was affirmed on his out-of-time direct appeal). Did the United States Court of Appeals for the Fifth Circuit err by denying Petitioner's request for a certificate of appealability to determine on which date the statute of limitations began running and the validity and applicability of *Salinas v. Dretke* in this situation?

QUESTIONS PRESENTED – Continued

QUESTION TWO:

After Petitioner was convicted by a Texas jury, his counsel rendered ineffective assistance of counsel by failing to timely file a Notice of Appeal. With Petitioner representing himself *pro se*, the Court of Criminal Appeals of Texas granted post conviction *habeas corpus* relief and restored him to a procedural position that allowed him to seek review of his conviction via direct appeal. In doing so, the court informed Petitioner that "all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues." Petitioner then timely pursued his direct appeal and state *habeas corpus* remedies and filed the instant section 2254 petition within one year of the conviction becoming final for state law purposes, excluding the time when his subsequent state *habeas* petitions were pending. Did the United States Court of Appeals for the Fifth Circuit err by denying Petitioner's request for a certificate of appealability to determine if this case presents the type of circumstances required for application of the doctrine of equitable tolling to the statute of limitations under 28 U.S.C. § 2254(d)(1)?

LIST OF PARTIES TO THE PROCEEDING

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LIST OF PARTIES
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

CITATIONS TO THE OPINION AND RELEVANT ORDERS

In an unpublished Order, the United States Court of Appeals for the Fifth Circuit denied Petitioner's Application for Certificate of Appealability seeking review of the district court's decision dismissing his Petition for Writ of Habeas Corpus by a Person in State custody pursuant to 28 U.S.C. § 2254. *Pietrzak v. Quarterman*, No. 06-41646, slip op. (5th Cir. February 19, 2008) (not designated for publication). A copy of the Fifth Circuit's Order is attached in the Appendix at pages App. 1 to App. 2.

In an unpublished Order of Dismissal and Final Judgment, the United States District Court for the Eastern District of Texas, Sherman Division, dismissed Petitioner's Petition for Writ of Habeas Corpus by a Person in State custody pursuant to 28 U.S.C. § 2254. *Pietrzak v. Director*, No. 4:05cv173 (E. Dist. Tex. October 16, 2006) (not designated for publication). A copy of the district court's Order of Dismissal and Final Judgment are attached in the Appendix at pages App. 3 to App. 11.

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered an Order denying Petitioner's Application for Certificate of Appealability on February 19, 2008. A copy of the Court of Criminal Appeals' Order appears in the Appendix at pages App. 1 to App. 2.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, Section 2244, United States Code:

> **(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > . . . .
>
> 28 U.S.C. § 2244(d)(1)(A)

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Nature of the Case:

Petitioner was convicted of aggravated sexual assault of a child and sentenced to thirty (30) years in prison and a $10,000.00 fine by a Collin County, Texas jury. Petitioner's appointed counsel filed his Notice of Appeal one day late, and his appeal was dismissed. Petitioner then filed a state application for Writ of Habeas Corpus and was granted an out-of-time appeal. Petitioner's conviction and sentence were then affirmed on direct appeal.

Petitioner then filed two applications for Writ of Habeas Corpus in Texas state court which were ultimately denied by the Court of Criminal Appeals of Texas. Petitioner filed the instant Petition for Writ of Habeas Corpus by a Person in State custody pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Texas. The district court ultimately dismissed the Petition on the grounds that it was time-barred pursuant to 28 U.S.C. § 2244(d)(1)(A). The United States Court of Appeals for the Fifth Circuit then denied Petitioner's Application for Certificate of Appealability seeking the opportunity to appeal the district court's dismissal of his section 2254 Petition.

Course of Proceedings and Disposition Below:

By an indictment filed April 29, 1997, Petitioner was charged with one count of aggravated sexual

assault and one count of injury to a child in trial court cause number 380-80392-97, pending in the 380th Judicial District Court located in Collin County, Texas.[1 C.R.[1] 5-7] A jury convicted Petitioner of aggravated sexual assault of a child.[1 C.R. 3] The same jury assessed Petitioner's sentence at thirty (30) years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a $10,000.00 fine.[1 C.R. 3; 4 C.R. 648] Judgment was entered on March 3, 1998.[4 C.R. 650-52]

At the time judgment was rendered, Petitioner was represented by appointed counsel in state court. Because his appointed counsel timely filed a Motion for New Trial on April 2, 1998, Petitioner had until June 1, 1998, to secure his right to direct appeal by filing a written Notice of Appeal. Petitioner's appointed state court counsel failed to meet that deadline and filed the Notice of Appeal one day late on June 2, 1998.[4 C.R. 687-88, 689]

On January 4, 2000, the state intermediate court of appeals entered an opinion dismissing Petitioner's direct appeal because the Notice of Appeal had been filed one day late. *Pietrzak v. State*, No. 05-98-01016-CR, slip op., 2000 WL 2679 (Tex. App.–Dallas, January 4, 2000, pet. ref'd) (not designated

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[1] Hereinafter, the abbreviation C.R. will be used as citation for the Clerk's Record volumes of the appellate record from the direct appeal and the abbreviation R.R. will be used as citation for the Reporter's Record volumes of the appellate record from the direct appeal.

for publication).[2] On February 9, 2000, the Court of Criminal Appeals of Texas granted Petitioner's *pro se* Motion for Extension of Time to File Petition for Discretionary Review ("PDR") and Petitioner timely filed the PDR on April 3, 2000. That PDR was refused by the Court of Criminal Appeals on June 7, 2000. *Pietrzak v. State*, No. PD-0795-00 (Tex. Crim. App. June 7, 2000) (mem. order) (not designated for publication).

On May 17, 2001, Petitioner, acting *pro se*, filed his first state Application for Writ of Habeas Corpus alleging, *inter alia*, that his court-appointed counsel had rendered ineffective assistance of counsel in violation of the Sixth Amendment by failing to timely file the Notice of Appeal which had resulted in dismissal of Petitioner's direct appeal. On September 19, 2001, the Court of Criminal Appeals granted relief on the claim concerning the untimely filing of the Notice of Appeal and dismissed the remaining claims without prejudice. *Ex parte Pietrzak*, No. 74,173, slip op. (Tex. Crim. App. September 19, 2001) (not designated for publication). The Court of Criminal Appeals' Opinion states as follows:

> This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.[3] After

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[2] A copy of the Court of Appeals of Texas' Opinion is attached in the Appendix at pages App. 12 to App. 13.

[3] *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 2005).

a jury trial, Applicant was convicted of the felony offense of aggravated sexual assault of a child. Punishment was assessed at thirty years confinement in the Texas Department of Criminal Justice, institutional division. Applicant's appeal was dismissed for lack of jurisdiction because notice of appeal was not timely filed. *Pietrzak v. State*, No. 05-98-01016 (Tex. App. – Dallas, delivered January 5, 2000, no pet.[4]).

Applicant contends that he was denied his right to appeal his conviction because his attorney filed notice of appeal one day late. The record supports Applicant's contention.

Applicant is granted an out-of-time appeal in cause number 380-80392-97 of the 380th Judicial District Court of Collin County, Texas. *Applicant is ordered returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure, all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. We hold that should Applicant*

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[4] The designation "no pet." appears to be an oversight by the Court of Criminal Appeals. Information available in the "Case Information" section of the Court of Criminal Appeals' website (www.cca.courts.state.tx.us) clearly indicates that the PDR was filed under cause number PD-0795-00 and was ultimately refused on June 7, 2000.

> *desire to prosecute an appeal, he must take affirmative steps to see that written notice of appeal is filed in the trial court within thirty days after the mandate of this Court has issued. . . .*

Ex parte Pietrzak, No. 74,173, slip op. at 1-2 (Tex. Crim. App. September 19, 2001) (emphasis added).[5]

Pursuant to the Court of Criminal Appeals' Order, Mandate issued on October 15, 2001. Petitioner timely filed his Notice of Appeal and pursued his direct appeal. The state intermediate court of appeals assigned a new cause number to the appeal and, on January 23, 2003, affirmed Petitioner's conviction and sentence. *Pietrzak v. State*, No. 05-01-1687-CR, slip op., 2002 WL 31957883 (Tex. App.–Dallas January 23, 2003, no pet.) (not designated for publication). Petitioner's time to seek further direct review via PDR expired on Monday, February 23, 2004. *See* TEX. R. APP. P. 4.1(a), 68.2(a). Petitioner did not file a PDR.

Petitioner then filed his second state Application for Writ of Habeas Corpus on August 13, 2003. This Application raised three substantive claims concerning the legality of Petitioner's conviction, including claims of ineffective assistance of counsel and due process violations arising from juror misconduct and improper appointment of a special judge. The Court

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[5] A copy of the Court of Criminal Appeals *per curiam* Opinion is attached in the Appendix at pages App. 15 to App. 16.

of Criminal Appeals of Texas denied relief on this particular application on November 23, 2004. *Ex parte Pietrzak*, No. 49,639-02 (Tex. Crim. App. November 23, 2004) (mem. order) (not designated for publication).

Petitioner filed his third state Application for Writ of Habeas Corpus on May 5, 2005. This Application raised claims concerning the violation of various consular notification requirements in the Vienna Convention and Consular Relations Convention and Protocols Signed at Warsaw May 31, 1972. The Court of Criminal Appeals of Texas denied relief on that application on November 23, 2005. *Ex parte Pietrzak*, No. 49,639-03 (Tex. Crim. App. November 23, 2005) (mem. order) (not designated for publication). On February 23, 2006, Petitioner timely filed his Petition for Writ of Certiorari seeking review of the Court of Criminal Appeals decision and this Court denied Certiorari on October 2, 2006. *Pietrzak v. Texas* 127 S. Ct. 38 (2006) (mem.).

Petitioner filed the instant § 2254 Petition in the district court on May 6, 2005. By a written Order of Dismissal and Judgment entered October 16, 2006, the district court dismissed the Petition as time-barred.[6] Petitioner timely filed his Notice of Appeal on

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[6] A copy of the district court's Order of Dismissal and Final Judgment are attached in the Appendix at pages App. 3 to App. 11.

November 14, 2006, and the district court denied certificate of appealability on March 15, 2007.

Petitioner filed his Application for Certificate of Appealability in the United States Court of Appeals for the Fifth Circuit on May 22, 2007. By an unpublished Order issued February 19, 2008, the court of appeals summarily denied the certificate of appealability.[7]

Petitioner's Substantive Claims:

Because the district court dismissed the instant petition on procedural grounds and neither the district court nor the court of appeals addressed the merits of Petitioner's substantive claims, a brief summary of those claims follows.

Petitioner's third[8] ground of relief alleged that his right to effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were violated because his trial counsel:

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[7] A copy of the Fifth Circuit's Order is attached in the Appendix at pages App. 1 to App. 2.

[8] Petitioner is a Polish citizen. Petitioner's first and second grounds of relief concerned violations of his at his rights under the Vienna Convention on Consular Relations and The Consular Relations Conventions and Protocols Signed at Warsaw May 21, 1972. Those claims are now foreclosed by this Court's decision in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), which was decided more than a year after Petitioner filed the instant section 2254 Petition.

(1) failed to properly object to the erroneous admission of hearsay statements supposedly made by the alleged injured party;

(2) failed to properly investigate the case by failing to interview the alleged injured party's mother and failing to call her as a witness;

(3) failed to call available good character witnesses to testify;

(4) failed to secure a writ of attachment or otherwise present the testimony of the alleged injured party's primary care pediatrician despite having a subpoena served on the witness and promising the jury in opening statement that said pediatrician would testify;

(5) improperly prevented Petitioner from testifying in his own defense during the guilt-innocence phase of trial by resting the defense case without calling Petitioner to testify despite the fact that Petitioner had unequivocally stated that he wanted to testify;

(6) failed to request that the jury be sequestered or questioned about whether they read an article in the local newspaper which ran during jury deliberations and which praised the prosecutor responsible for prosecuting Petitioner for her tireless efforts on behalf of abused children; and,

(7) called an "expert witness" to testify on Petitioner's behalf who had been denied access to children for examination purposes, had lost a CPS contract because of defense

bias, and had been coercive and manipulative during his interview with the alleged injured party.

Petitioner's fourth ground of relief alleged that Petitioner's due process rights were violated because the jurors in the case improperly negotiated a sentence for Petitioner in exchange for two jurors who did not believe the State had proved its case beyond a reasonable doubt agreeing to change their vote to guilty and then by disregarding the improper agreement during sentencing and arriving at a sentence by averaging the sentence wanted by each juror.

ARGUMENT AND AUTHORITIES

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED BY FAILING TO GRANT A CERTIFICATE OF APPEALABILITY TO DETERMINE IF THE REASONING OF *SALINAS V. DRETKE* SHOULD GOVERN THE DETERMINATION OF WHEN PETITIONER'S STATUTE OF LIMITATIONS TO FILE A SECTION 2254 PETITION BEGAN RUNNING PURSUANT TO 28 U.S.C. § 2244(d)(1)(A).

A) Petitioner Initially Lost His Right to Seek Direct Review of His Conviction and Sentence Because of an Error by His Appointed Counsel and Through No Fault of His Own

As set out above, Petitioner's appointed counsel filed his original Notice of Appeal one day late, on

June 2, 1998. This resulted in the intermediate appellate court dismissing Petitioner's original direct appeal on February 3, 2000, and the Court of Criminal Appeals of Texas refusing Petitioner's PDR challenging that decision on June 7, 2000. The district court concluded that Petitioner's statute of limitations began running on September 5, 2000, ninety days after that PDR was refused. *See* Order of Dismissal in *Pietrzak v. Director*, No. 4:05cv173, slip op. at 4.

However, also as set out above, on September 19, 2001, Court of Criminal Appeals found that Petitioner was denied his right to appeal because of a mistake made by his appointed counsel and granted Petitioner *habeas corpus* relief in the form of an out-of-time appeal. Nothing in the record indicates that Petitioner was, in any way, responsible for this error by his appointed counsel.

B) As a Matter of State Law, the Court of Criminal Appeals Rendered Petitioner's Conviction Non-Final by Granting Him the Right to Seek Direct Review

The Order issued by the Court of Criminal Appeals specifically stated that "*all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues.*" Thus, under Texas law, Petitioner "was restored to the position of a recently convicted felon, eligible to pursue a form of direct review" of his conviction and

sentence. *See Salinas v. Dretke*, 354 F.3d 425, 428 (5th Cir.), *cert. denied*, 541 U.S. 1032 (2004).

As set out above, Petitioner then timely filed Notice of Appeal, a direct appeal to the state intermediate appellate court ensued, and Petitioner's conviction and sentence were affirmed on January 23, 2003. The time for filing a PDR expired on February 24, 2003.[9]

C) *Salinas v. Dretke* and the District Court's Reliance on It

In concluding that Petitioner's statute of limitations began running on September 5, 2000, the district court relied on the Fifth Circuit's Opinion in *Salinas v. Dretke*. *See* Order of Dismissal in *Pietrzak v. Director*, No. 4:05cv173, slip op. at 3 ("The Court notes that Petitioner's first application for writ of

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[9] Assuming that Petitioner ultimately prevails on this procedural argument, his "conviction bec[ame] final when the time for seeking further direct review in the state court expire[d]" and that is the date upon which the AEDPA statute of limitations should have began running. *See, e.g.*, *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). If the statute of limitations began running on February 24, 2003, 171 days expired before Petitioner's second state Application for Writ of Habeas Corpus was filed on August 14, 2003. One hundred sixty three (163) more days expired between November 23, 2004, (the date on which the Court of Criminal Appeals denied relief on the second state Application) and May 5, 2005, (the date on which Petitioner's third state Application was filed). Thus, a total of 334 days of the statute of limitations had expired when the instant Petition was filed on May 6, 2005.

habeas corpus was clearly collateral and the granting of an out-of-time appeal during collateral proceedings does not restart the running of the limitations period.").

In *Salinas*, a Texas inmate had timely pursued the direct appeal of his capital murder conviction. *Salinas*, 354 F.3d at 427. Salinas' attorney failed to notify him that his conviction had been affirmed by the intermediate court of appeals. *Id.* As a result, Salinas missed the deadline for filing a Petition for Discretionary Review ("PDR") seeking review of the intermediate court of appeals' decision by the Court of Criminal Appeals of Texas. *Id.* Salinas ultimately filed a state application for *habeas corpus* relief arguing that he should be granted an out-of-time right to file a PDR since his attorney had failed to timely notify him of the affirmance thereby depriving him of the opportunity to timely file the PDR in the first place. *Id.* The Court of Criminal Appeals of Texas ultimately agreed and granted the state *habeas* petition. *Id.* In doing so, the Court of Criminal Appeals granted Salinas the right to file an "out-of-time" PDR, the effect of which "was to 'return [Salinas] to the point at which he can file a petition for discretionary review. . . . For purposes of the Texas Rules of Appellate Procedure, all time limits shall be calculated as if the Court of Appeals' decision had been rendered on the day the mandate of the Court of Criminal Appeals issues.'" *Id.* at 428.

In its analysis, the Fifth Circuit noted that, under Texas law, Salinas had been "restored to the

position of a recently convicted felon, eligible to pursue a form of direct review in the Court of Criminal Appeals." *Id.* However, the Fifth Circuit went on to note that, "On its face, AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between. So long as the petitioner is being held pursuant to the same state court judgment, nothing in AEDPA allows for a properly initiated limitations period to be terminated altogether by collateral state court action. Rather, the statutory framework only provides for the tolling of limitations during the pendency of state collateral review." *Id.* at 429-30 (citations omitted).

The Fifth Circuit then held that, since Salinas' right to file an "out-of-time" PDR was secured through state *habeas* proceedings, it "does not arise under the 'direct review' procedures of the Texas judicial system." *Id.* at 431. Accordingly, the Fifth Circuit ultimately held that the Court of Criminal Appeals' granting of the "out-of-time" PDR did not alter the fact that the limitations period had already began running and lapsed. *Id.*

D) Reasons A Certificate of Appealability Should Have Been Issued

The Fifth Circuit should have granted Petitioner's Application for Certificate of Appealability

because "jurists of reason would find it debatable"[10] whether the reasoning of *Salinas* should govern the question of whether Petitioner's statute of limitations under 28 U.S.C. § 2244(d)(1)(A) began running on September 5, 2000, or February 24, 2003. The validity and applicability of *Salinas* in this situation is debatable for two reasons.

1) *Salinas* Is Distinguishable

Salinas is distinguishable from the case at bar because it dealt with a situation where the Court of Criminal Appeals granted an out-of-time PDR rather than an out-of-time appeal. By granting an out-of-time appeal, the Court of Criminal Appeals effectively, as a matter of law, changed the date upon which sentence was imposed upon Petitioner thereby restarting the appellate and post-conviction calendars on that date. In the situation present in *Salinas*, the Court of Criminal Appeals action did not reset the date upon which sentence was imposed, but merely effectively changed the date upon which the intermediate appellate court's ruling was issued. In the situation at bar, because he was granted an entirely new direct appeal, Petitioner's judgment did not become "final by the conclusion of direct review or the expiration of the time for seeking such review"[11] until

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[10] *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

[11] *See* 28 U.S.C. § 2244(d)(1)(A).

his direct appeal was completed. Thus, *Salinas* does not directly control this situation.

By refusing to even review the district court's holding that *Salinas* does control this situation, the Fifth Circuit has effectively decided an important question of federal law that has not been, but should be, settled by this Court. *See* SUP. CT. R. 10(c).

2) There Is a Split Among the Circuits as to Whether the Reasoning of *Salinas* Is Valid

To the extent that *Salinas* does control this situation, Petitioner respectfully asserts that *Salinas* was wrongfully decided and that the Fourth Circuit's reasoning in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005), should control.

The *Frasch* court was faced with an identical situation to the one at bar. In that case, the court specifically rejected the reasoning of *Salinas* and held that, while the petitioner had utilized a collateral proceeding to obtain his right to direct appeal, that collateral proceeding "ended with the order granting him the right to file a belated application for leave to appeal" and, at that point, the petitioner was seeking direct review. *Id.* at 522-24. Accordingly, the *Frasch* court held that the AEDPA statute of limitations did not expire until the petitioner's time for seeking further direct review expired after his initial direct appeal was refused.

Given that the decisions in *Salinas* and *Frasch* are directly at odds with each other and that this is an important procedural issue which is sure to arise in other circuits in the future, this Court should exercise its supervisory power to resolve this issue. *See* SUP. CT. R. 10(a). On March 17, 2008, apparently recognizing this split in the circuits on this procedural issue, this Court granted *certiorari* to resolve an identical procedural issue.[12] *See Jimenez v. Quarterman*, 128 S. Ct. 1646 (2008) (mem.).

II.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED BY FAILING TO GRANT A CERTIFICATE OF APPEALABILITY TO DETERMINE IF PETITIONER WAS ENTITLED TO EQUITABLE TOLLING OF THE 28 U.S.C. § 2244(d)(1)(A) STATUTE OF LIMITATIONS.

Although this Court has never expressly held as such, it appears that the 28 U.S.C. § 2244(d) statute

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[12] The precise question presented in *Jimenez* is, "Whether a Certificate of Appealability should have issued pursuant to Slack v McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) on the question of Whether pursuant to 28 U.S.C. § 2244(d)(1)(A) When through no fault of the petitioner, he was unable to obtain a direct review and the highest State Court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review resetting the 1-year limitations period?"

of limitations is subject to the principles of equitable tolling. *See, e.g., Lawrence v. Florida*, 127 S. Ct. 1079, 1985 (2007) (assuming without deciding that equitable tolling applies). To be entitled to equitable tolling, a petitioner must demonstrate (1) that he has been diligently pursuing his rights, and (2) that some extraordinary circumstance prevented him from timely filing. *See, e.g., id.*

After determining that, pursuant to the logic of *Salinas*, Petitioner's statute of limitations had run on June 16, 2003, and that the instant Petition was time-barred, the district court also concluded that Petitioner has failed to show the "rare and exceptional" circumstances that would merit equitable tolling of the statute of limitations in this case.

As set out above and in the district court's Order of Dismissal, Petitioner's appointed state court counsel dropped the ball on his direct appeal which is the only reason that *Salinas* could operate to start his statute of limitations running in June 2003.

To compound this problem, Petitioner filed a *pro se* state *habeas* petition (within one year of the denial of his initial PDR) and was told by the Court of Criminal Appeals that he would be granted a direct appeal and that "*all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues.*" In other words, the highest criminal court in the State of Texas effectively told Petitioner that the statute of limitations (a "time

limit") would be calculated as if his trial had concluded in 2001 instead of 1998.

Petitioner then timely pursued his direct appeal and, after his case was affirmed, timely retained counsel who filed his second state habeas petition within six months of his case being affirmed on direct appeal.

Finally, all of this occurred before the Fifth Circuit handed down its opinion in *Salinas*. Therefore, neither Petitioner nor his counsel were on notice that the Court of Criminal Appeals' representation that "all time limits" had been reset did not include the "time limit" imposed by 28 U.S.C. § 2244(d)(1)(A).

Under these circumstances, it is debatable among jurists of reason whether the "rare and exceptional" circumstances meriting equitable tolling exist and the Fifth Circuit should have granted a certificate of appealability to resolve the issue. This Court has resolved neither the issue of whether the doctrine of equitable tolling does, in fact, apply to statute of limitations imposed by section 2244(d) nor the issue of whether circumstances similar to those presented in this case would justify equitable tolling if it does apply. Therefore, Petitioner respectfully submits that this Court should take this opportunity to settle this important issue of federal law. *See* SUP. CT. R. 10(c).

PRAYER

Petitioner therefore prays that this Court will grant this Petition, order such further briefing as this Court feels appropriate, and remand this cause with directions that the United States Court of Appeals for the Fifth Circuit issue a Certificate of Appealability and consider Petitioner's appeal from the district court's dismissal of his 28 U.S.C. § 2254 Petition.

Respectfully submitted,

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Attorney for Petitioner
Rafal Pietrzak

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-41646
USDC No. 4:05-CV-173

RAFAL PIETRZAK, also known as Rafal Ted Pietrzak

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

(Filed Feb. 19, 2008)

ORDER:

Rafal Pietrzak, Texas prisoner # 826611, seeks a certificate of appealability (COA) following the dismissal of his 28 U.S.C. § 2254 petition as untimely. Pietrzak is serving a 30-year prison sentence for the aggravated sexual assault of a five-year-old child.

Pietrzak contends that his § 2254 petition should be deemed timely because the granting of an out-of-time state appeal should have restarted the limitation period of 28 U.S.C. § 2244(d)(1)(A). Alternatively he contends that the limitation period should have been equitably tolled. He also argues his substantive claims of ineffective assistance of counsel, jury misconduct, and the deprivation of rights granted by the Vienna Convention and a 1972 Warsaw treaty.

Pietrzak has failed to show that reasonable jurists would find the district court's procedural ruling debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). His motion for a COA is DENIED.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RAFAL PIETRZAK	§	CIVIL ACTION NO.
VS.	§	4:05cv173
	§	
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

(Filed Oct. 16, 2006)

The above-entitled and numbered civil action was referred to United States Magistrate Judge Don D. Bush, who issued a Report and Recommendation concluding that the petition for a writ of habeas corpus should be dismissed as time-barred. The Petitioner has filed objections.

The Report of the Magistrate Judge, which contains his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by the Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of the Petitioner are without merit.

The Court is of the opinion that the unique facts of this case necessitate a detailed discussion about whether the petition is time-barred. On March 3, 1998, the Petitioner was convicted of the offense of

Aggravated Sexual Assault in Collin County. The Petitioner had to file a notice of appeal by June 1, 1998. The notice of appeal was filed one day late on June 2, 1998, thus the state intermediate court of appeals dismissed the appeal as untimely. The Texas Court of Criminal Appeals granted him a motion for an extension of time to file a petition for discretionary review, but the Texas Court of Criminal Appeals ultimately refused his petition for discretionary review on June 7, 2000.

The Petitioner then began collateral challenges to his conviction. He filed his first application for a writ of habeas corpus on May 17, 2001. On September 19, 2001, the Texas Court of Criminal Appeals granted him an out-of-time appeal. The state intermediate court of appeals affirmed his conviction on January 23, 2003. The Petitioner did not file a petition for discretionary review. He filed a second application for a writ of habeas corpus on August 14, 2003, which was denied without written order on the trial court findings without a hearing on November 23, 2004. A third application for a writ of habeas corpus was filed on May 5, 2005. The Texas Court of Criminal Appeals denied the application without written order on November 23, 2005. The Petitioner filed a petition for a writ of certiorari, Cause Number 05-1079, which was denied on October 2, 2006. The present petition was filed on May 6, 2005.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 was signed into law. The law made several changes to the federal habeas

corpus statutes, including the addition of a one year statute of limitations. 28 U.S.C. § 2244(d)(1). The appropriate limitations provision in this case is § 2244(d)(1)(A), which states that the statute of limitations started running when the conviction became final. The provisions of 28 U.S.C. § 2244(d)(2), a tolling section, provide that the time during which a properly filed application or other collateral review shall not count toward any period of limitation. The initial question for the Court concerns when the conviction became final. Citing *Foreman v. Dretke,* 383 F.3d 336 (5th Cir. 2004), the Director argued that the conviction became final when the deadline for the Petitioner to file his notice of appeal expired on June 1, 1998. The Petitioner argued that his conviction became final when the time expired for him to file his second petition for discretionary review expired on February 24, 2003.

The terms of § 2244(d)(1)(A) specify that a judgment of conviction becomes "final by the conclusion of direct review or the expiration of the time for seeking such review." In *Foreman,* the Fifth Circuit concluded that the "provision supplies two alternate methods under which a conviction can become final: direct review can end or the time to pursue the direct review can expire." 383 F.3d at 338. The Fifth Circuit noted that the distinction between whether a review of a conviction is viewed as direct or collateral can be critical, and the dispositive issue in *Foreman* was whether the appellant "filed a timely appeal in the state court system." *Id.* at 341. In the present case,

the Petitioner's opportunity to file a notice of appeal expired on June 1, 1998. He did not file a timely appeal, and his conviction arguably became final at that time. The Court notes that the Petitioner's first application for a writ of habeas corpus was clearly collateral and the granting of an out-of-time appeal during collateral proceedings does not restart the running of the limitations period. *Salinas v. Dretke,* 354 F.3d 425 (5th Cir. 2004), *cert. denied,* 541 U.S. 1032 (2004).

The novel issue before the Court concerns how to treat the period of time between June 2, 1998, and June 7, 2000. Should the Petitioner's efforts to appeal from the decision of the intermediate court and to obtain a decision by the Texas Court of Criminal Appeals be viewed as direct or collateral? The Court has not uncovered any Fifth Circuit cases directly on point. A cursory review of *Foreman* would lead to the conclusion that this period of time should not be viewed as direct review since the appeal was untimely. In *Salinas,* however, the Fifth Circuit held that if the granting of an "out-of-time" petition for discretionary review "comes as a result of direct review, there would be no basis for limitations even to begin running until the Court of Criminal Appeals has finalized the judgment by declining to grant relief on that level of appeal. If, on the other hand, an 'out-of-time' PDR is awarded only as a result of the collateral review process, limitations is tolled merely while the petitioner seeks to obtain that relief." *Id.* at 430. In *Foreman,* the Fifth Circuit examined *Salinas* and

concluded that it was required to look at state law to determine whether the granting of an out-of-time PDR was part of the direct review process or collateral review. 383 F.3d at 339.

In the present case, the Texas Court of Criminal Appeals granted the Petitioner an extension of time to file a petition for discretionary review as part of the direct appeal process. The Texas Court of Criminal Appeals subsequently refused the petition on June 7, 2000. This period of time was considered by state law as part of the direct review process and should be treated as such. The Petitioner did not file a petition for a writ of certiorari, thus his conviction became final ninety days after the decision of the Texas Court of Criminal Appeals refusing his petition for discretionary review. *Foreman,* 383 F.3d at 338 (citing *Roberts v. Cockrell,* 319 F.3d 690, 694 (5th Cir. 2003)). *See also Ott v. Johnson,* 192 F.3d 510, 513 (5th Cir. 1999). The Texas Court of Criminal Appeals refused his petition for discretionary review on June 7, 2000. The conviction became final ninety days later on September 5, 2000. The present petition was due no later than September 5, 2001, in the absence of tolling provisions. It was not filed until May 6, 2005.

It is again noted that the provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a properly filed application for state post-conviction or other collateral review is pending shall not be counted toward any period of limitation. The Petitioner filed his first application for a writ of habeas corpus on May 17, 2001, which resulted in an out-of-time

appeal. This collateral proceeding ended when the opportunity to file a petition for discretionary review expired on February 24, 2003. The collateral proceeding was pending 648 days, thus the deadline of September 5, 2001, was tolled 648 days to June 16, 2003. The Petitioner did not file his second application for a writ of habeas corpus in state court until August 14, 2003. The pendency of the second application, as well as the third application, did not effectively toll the deadline unless some other tolling provision is applicable.

The Petitioner argued that he should be entitled to equitable tolling. The Fifth Circuit has held that the one year limitations period is a statute of limitations, not a bar to federal jurisdiction, thus the limitations period can be equitably tolled. *Davis v. Johnson,* 158 F.3d 806, 807 (5th Cir. 1998), *cert. denied,* 526 U.S. 1074 (1999). The basic principles of equitable tolling were discussed in *Ott v. Johnson,* 192 F.3d 510, 513-514 (5th Cir. 1999), *cert. denied,* 529 U.S. 1099 (2000):

> we recognize that the equitable tolling doctrine is to be applied only if the relevant facts present sufficiently "rare and exceptional circumstances" that would warrant application of the doctrine. We recently explained that equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights," and noted that

"excusable neglect" does not support equitable tolling.

The Fifth Circuit went on to find that there was no error in the district court's decision not to apply the doctrine of equitable tolling regarding delays associated with the Texas Court of Criminal Appeals' notification system through mailed postcards. *Id.* at 514. Other decisions by the Fifth Circuit held that inadequacies in a prison law library likewise do not provide a basis for equitable tolling. *Felder v. Johnson,* 204 F.3d 168 (5th Cir. 2000), *cert. denied,* 531 U.S. 1035 (2000). A prisoner is not entitled to equitable tolling for the seven week gap between the date he submitted a state petition for post-conviction relief to prison officials for mailing and the date the petition was stamped filed. *Coleman v. Johnson,* 184 F.3d 398 (5th Cir. 1999). The fact that a prisoner did not receive notice of the statute of limitations until 43 days after AEDPA's effective date did not warrant equitable tolling. *Fisher v. Johnson,* 174 F.3d 710 (5th Cir. 1999). Likewise, his confinement in a psychiatric ward for seventeen days on medication and without his glasses did not warrant equitable tolling. *Id.* Finally, a claim of actual innocence, standing alone, is not the type of "rare and exceptional" circumstance which would justify equitable tolling "given that many prisoners maintain that they are innocent." *Felder v. Johnson,* 204 F.3d at 171.

In the present case, the Petitioner focused on the decision of the Texas Court of Criminal Appeals granting him an out-of-time appeal on September 19,

2001, which stated that "all time limits should be calculated as if the sentence has been imposed on the date that the mandate of this Court issues." The order of the Texas Court of Criminal Appeals merely concerned the new deadline for the Petitioner to file a notice of appeal from his conviction. The order had nothing to do with possible federal petitions for a writ of habeas corpus. The Petitioner has not shown "rare and exceptional" circumstances warranting equitable tolling. The present petition was filed too late and is time-barred. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 16th day of October, 2006.

/s/ Michael H. Schneider
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RAFAL PIETRZAK	§	CIVIL ACTION NO.
VS.	§	4:05cv173
	§	
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

(Filed Oct. 16, 2006)

The Court having considered the Petitioner's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that the petition for a writ of habeas corpus is **DISMISSED** with prejudice.

SIGNED this 16th day of October, 2006.

/s/ Michael H. Schneider
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

2000 WL 2679

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TX R RAP RULE 47.7, UNPUBLISHED OPINIONS HAVE NO PRECEDENTIAL VALUE BUT MAY BE CITED WITH THE NOTATION "(not designated for publication)."

Court of Appeals of Texas, Dallas.
Rafal Ted PIETRZAK, Appellant,
v.
The STATE of Texas, Appellee.
No. 05-98-01016-CR.

Jan. 4, 2000.

On Appeal from the 380th Judicial District Court, Collin County, Texas, Trial Court Cause No. 380-80392-97.

Before Justices KINKEADE, JAMES, and FITZGERALD.

MEMORANDUM OPINION

JAMES.

A jury convicted Rafal Ted Pietrzak of aggravated sexual assault. March 3, 1998, sentence of thirty years confinement and a $10,000 fine was imposed. Appellant filed a timely motion for new trial on April 2, 1998, thus his notice of appeal was due by June 1, 1998. See TEX.R.APP.P. 21.4(a), 26.2(a)(2). Appellant

filed his notice of appeal on June 2, 1998, one date late.[1] Because appellant's notice of appeal is untimely, we do not have jurisdiction over the appeal. *See Slaton v. State,* 981 S.W.2d 208, 210 (Tex.Crim.App.1998) (per curiam); *Olivo v. State,* 918 S .W.2d 519, 523 (Tex.Crim.App.1996); *Boyd v. State,* 971 S.W.2d 603, 605 (Tex.App. – Dallas 1998, no pet.). Accordingly, we dismiss the appeal for want of jurisdiction.

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[1] The Court directed appellant and the State to file briefs addressing our jurisdiction over the appeal. Appellant filed a brief stating that sentence was imposed on January 27, 1999, appellant signed a pro se motion for new trial and notice of appeal on February 24, 1999, and the documents were filestamped March 3, 1999. These dates do not apply to this appeal. The State asserts we do not have jurisdiction because the notice of appeal is late.

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 74,173

EX PARTE RAFAL TED PIETRZAK, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM COLLIN COUNTY

The opinion was delivered per curiam.

OPINION

This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P. After a jury trial, Applicant was convicted of the felony offense of aggravated sexual assault of a child. Punishment was assessed at thirty years confinement in the Texas Department of Criminal Justice, institutional division. Applicant's appeal was dismissed for lack of jurisdiction because notice of appeal was not timely filed. *Pietrzak v. State,* No. 05-98-01016 (Tex. App. – Dallas, delivered January 5, 2000, no pet.).

Applicant contends that he was denied his right to appeal his conviction because his attorney filed notice of appeal one day late. The record supports Applicant's contention.

Applicant is granted an out-of-time appeal in cause number 380-80392-97 of the 380th Judicial District Court of Collin, County, Texas. Applicant is ordered returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure, all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. We hold that should Applicant desire to prosecute an appeal, he must take affirmative steps to see that written notice of appeal is filed in the trial court within thirty days after the mandate of this Court has issued. Applicant's remaining claims are dismissed. *Ex parte Torres,* 943 S.W.2d 469 (Tex. Crim. App. 1997).

DELIVERED: September 19, 2001
DO NOT PUBLISH